Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

HENRY LEWIS MCKINNEY
and LILLIE MARIE MCKINNEY
Petitioners,

v.

CLIFFORD L. DICK
and PATRICIA A. DICK
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

HENRY LEWIS MCKINNEY
Petitioner Submitting Pro Se
1230 W. 28th Court
Lawrence, KS 66046
(913) 842 -7425

85 pp

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A. DID THE KANSAS COURT OF APPEALS DENY THE PETITIONERS DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT BY MISREPRESENTING THE TRIAL COURT'S DECISION OF SUMMARY JUDGMENT FOR THE PETITIONERS WHEN THEY STATED THAT PETITIONERS ACTUALLY LOST THE CASE BECAUSE THEIR REQUEST FOR RETURN OF $6,000 MONIES PAID FOR PURCHASE OF REAL ESTATE WAS DENIED?

B. DID THE COURT OF APPEALS' RULING ON THE APPLICATION OF THE KANSAS CONSUMER PROTECTION ACT (KCPA) TO THIS CASE DENY PETITIONERS DUE PROCESS AND EQUAL PROTECTION AVAILABLE UNDER LAW?

C. DID THE KANSAS COURT OF APPEALS' RULING ON "DAMAGES" REWRITE THE 1988 AND 1990 CONTRACTS AND THE TRIAL COURT'S DECISION, AND

ERRONEOUSLY SUBJECT PETITIONERS TO "DAMAGES" AFTER THEY WERE AWARDED SUMMARY JUDGMENT, THUS DENYING PETITIONERS' THEIR FOURTEENTH AMENDMENT RIGHTS OF EQUAL PROTECTION?

D. DID THE COURT OF APPEALS AND THE TRIAL COURT DENY PETITIONERS' DUE PROCESS AND EQUAL PROTECTION BY IGNORING MR. MCKINNEY'S MENTAL CONDITION WHEN THE 1990 CONTRACT WAS SIGNED?

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

THE PETITIONERS, HENRY LEWIS MCKINNEY, AND LILLIE MARIE MCKINNEY, PROCEEDING PRO SE, hereby petition this Court to issue a Writ of Certiorari to review the Kansas Court of Appeals' Opinion, filed July 30, 1993. Review denied by the Kansas Supreme Court on September 28, 1993. Extension to file a petition

for a writ of certiorari on January 26, 1994, granted by Associate Justice of the United States Supreme Court Ruth Bader Ginsburg on December 20, 1993.

II. OPINIONS BELOW

(a) On July 30, 1993 the Kansas Court of Appeals issued its unpublished opinion which is attached hereto and designated as **APPENDIX A.**

(b) On September 28, 1993, the Kansas Supreme Court denied review of the Kansas Court of Appeal's decision, which is attached hereto and designated as **APPENDIX B.**

III. JURISDICTION

(a) The date of judgment which is sought to be reviewed is July 30, 1993, with Review denied on September 28, 1993.

(b) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are due process and equal protection under the Fourteenth Amendment of the Constitution.

Statutory provisions involved are K.S.A. 60-211, which forbids frivolous law suits and arguments and Gordon v. Gordon, 218 Kan. 686, 545 P. 2d 328 (1976), which states "As a general rule anything that savors of acquiescence in a judgment by a party to a lawsuit cuts off the right to appellate review."

Also involved is State v. Fisher, 233 Kan. 29, 661 P.2d 791 (1983), which states as a general rule that the appellate courts will not consider issues raised for the first time on appeal.

Finally, it is a general principle of Kansas law that it is the duty of the courts to enforce contracts as they are legally concluded, not to make new contracts. Bailey

v. Talbert, 179 Kan. 176, Syl. 6, 294 P.2d 220 (1956)

V. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This litigation originates from two contracts of 1988 and 1990 for 23 acres of real estate in Jefferson County between the Dicks and the McKinneys.

The 1988 contract failed by contractual agreement because very specific contingencies were not met. The McKinneys notified the Dicks by mail that the contract failed, but the Dicks refused to return $2,000 earnest money, as required by the contract.

Petitioner Henry Lewis McKinney had serious kidney failure with complications beginning in the fall of 1987 and stopped teaching at the University of Kansas after the spring term of 1988 except for a few advanced students. His health continued to fail and by

the end of 1989, Mr. McKinney was critically ill and under extreme duress.

At the same time the Dicks were harassing the McKinneys to sign another contract to buy their property since the 1988 contract had failed.

Repeatedly assured that the Dicks' access to the property was fine and that the abstract of title was good, and under great and constant pressure from the Dicks, the McKinneys signed a new contract on January 20, 1990, for the same 23 acres. Medical testimony has been introduced in the Record that Mr. McKinney was mentally unable because of complications from his severe kidney failure to conclude any contracts whatsoever. Record, III, 720 (Exhibit B)

The following month, the McKinneys learned that the Dicks had fraudulently misrepresented their road access and their abstract definitely was not marketable. The

McKinneys had the contractual right to make requirements for the abstract to pass marketability to their satisfaction. The Dicks tried to evade the contractual requirement by withholding the abstract from the McKinneys, and instead had their attorney send a letter saying the abstract was good. The McKinneys rescinded the contract.

Closing did not occur on March 1, 1990; on March 6, 1990 the Dicks filed suit against the McKinneys. The Dicks subsequently filed nonconforming motions for summary judgment. The McKinneys filed a number of motions for summary judgment, none of which was answered by the Dicks.

Under these facts, because the Dicks failed to answer the McKinneys' motions, summary judgment for the McKinneys was mandatory under Kansas (Supreme Court Rule 141(b)) and Federal law (Rules of Practice and Procedure of the United States District Court,

Court of Kansas, Rules 206(c)(g)) and that should have ended this lawsuit. The facts and law have remained the same since then except for Mr. McKinney's medical condition: he now depends on dialysis in order to survive.

Judge Nafziger paid no attention to Kansas Supreme Court Rule 141(b), the factual situation, or the Fourteenth Amendment and refused to grant summary judgment for the McKinneys even after reconsideration was requested. The McKinneys appealed to the Kansas appellate courts who refused jurisdiction at that time for technical reasons.

The McKinneys then moved for Judge Nafziger to recuse himself for conspicuous bias and prejudice on behalf of the Dicks. November 11, 1991. In March 1992, Mr. McKinney handed Judge Nafziger a detailed Affidavit of Bias and Prejudice, and Judge Nafziger then finally recused himself and was replaced by

Judge Michael G. Moroney, Wyandotte County, Kansas.

After Judge Moroney assumed control of Dick v. McKinney, the McKinneys, individually, filed motions for summary judgment and a Motion to Dismiss; the Dicks did not file similar motions. The trial court awarded a broad-based summary judgment to the McKinneys: "15. The Motion for Summary Judgment is granted, insomuch as it comports with the above mentioned rulings." Judge Michael G. Moroney, Journal Entry and Memorandum Decision, Record, III, 922. Emphasis added.

Summary Judgment actually also extinguished two apparent exceptions by the trial court: the issue of returning the $2,000 (earnest money) and the $4,000 (compensation) to the McKinneys; both items were included in many places in the McKinneys' motions. As a matter of law, the Dicks conceded the points

by failing to answer motions for summary judgment.

Both parties asked for reconsideration. The Dicks wanted more money, and the McKinneys wanted the return of their $6,000 as the facts and the law required. The trial court, however, denied reconsideration.

The Dicks appealed to the Court of Appeals ON ONE POINT ONLY, saying that they wanted more money even though they lost summary judgment.

The McKinneys also appealed on the basis that they had won summary judgment and that the trial court had recognized and accepted the McKinneys' specific points in the motions for summary judgment that the Dicks had already conceded by failure to answer, namely among other points, the $6,000 should be returned to the McKinneys.

On July 30, 1993, the Court of Appeals rejected or attacked almost every point in the

McKinneys' 43 page appeal brief, whether the point was subject to appellate review or not. Even the McKinneys' award of summary judgment was, in effect, negated by the qualifier that the Dicks really won the case because they got the $6,000.

The McKinneys asked, with supporting motions, the Kansas Supreme Court to review the Court of Appeal's decision to allow the Dicks to seek any damages they could prove even though the McKinneys won summary judgment. The trial court had never intended allowing the Dicks to seek "damages" and has said so. See **App. C**, below.

The Kansas Supreme Court denied review, and the McKinneys have appealed to the United States Supreme Court for relief under the Fourteenth Amendment issues of due process and equal protection.

Dick v. McKinney is essentially a local contract dispute over real estate. The Dicks

are using the courts to ruin the McKinneys financially just as they did heart patient Karl Ganz on his hospital bed. Deposition of Clifford L. Dick, Record, VII, 85-89. To accomplish their goal they and their friends have suspended the McKinneys' constitutional rights in the Fourteenth Amendment.

B. STATEMENT OF THE FACTS

The litigants engaged in two real estate contracts in 1988 and 1990 for purchase of the Dicks' real estate in Jefferson County, Kansas. The 1988 contract failed because, as the Court of Appeals has admitted, many "contingencies were not met, and the sale was never completed." Court of Appeals Opinion, App. A, p. 44, below.

The 1990 contract also failed. The trial court recognized that rescission was proper because the Respondents fraudulently misrepresented their entrance road access. Nowhere

did the trial court reject that prominent point. The Dicks had admitted that the access was misrepresented by failing to answer the McKinneys' motions for summary judgment: much case law supports the same conclusion.

Respondents filed suit five days after closing had been scheduled: the specific terms of the contract allowed only foreclosure after 90 days. In their suit, the Dicks tried to enforce both the 1988 (which had died) and the 1990 contracts, a violation of Kansas law. Griffith v. Stout Remodeling, Inc., 219 Kan. 408, 548 P.2d 1238 (1976)

The Petitioners answered, among other things, that their rescission of the said contract was properly based on fraudulent misrepresentation and failure of the Dicks to furnish the McKinneys with a satisfactory, marketable and unencumbered abstract of title by March 1, 1990, which was a vital requirement of the 1990 contract. The Dicks have

repeatedly admitted that they never furnished any abstract of title to Mrs. McKinney, as the Record confirms.

During 1990, Respondents claimed to have abandoned the 1988 contract, but they never have. They have still attempted to date their purported "damages" from the time of the 1988 contract, and no doubt will continue to do so if the case is remanded to the District Court.

Eventually, motions for summary judgment were filed. The first two motions by Respondents were clearly not within the definition of motions for summary judgment. The third motion was not even signed, first appeared on February 21, 1991, with no notice, after court had adjourned, the clerk wrote a false date on it, and it was fraught with so many legal problems that the McKinneys moved several times to strike it under K.S.A. 60-211, as the Record shows. A biased and prejudiced judiciary under Judge Nafziger would not even

comment or consider the matter, thus denying Petitioners due process and equal protection. Petitioners answered the Dicks' illegal filing anyway, showing the "filing" was without merit.

Judge Nafziger issued a decision on May 17, 1991. Petitioners asked for reconsideration, pointing out that the Court was clearly denying mandatory Kansas and Federal law.

Judge Nafziger, ex parte, continued to ignore procedures relevant to summary judgment and denied the McKinneys' motion. He did not critique the McKinneys' motions. The McKinneys appealed but the appellate courts declined at that time to assume jurisdiction, supposedly on technical grounds.

After his decision, Judge Nafziger eventually recused himself for conspicuous bias and prejudice on behalf of the Dicks, and was replaced by Judge Michael G. Moroney, Wyandotte County, Kansas.

Both Petitioners quickly filed motions for summary judgment and a Motion to Dismiss was also adopted by Henry Lewis McKinney from Lillie Marie McKinney's filings. **ALL PHASES OF THE LITIGATION WERE COVERED THOROUGHLY**. On July 13, 1992 the trial court awarded broad-based summary judgment to the McKinneys but denied their request for return of the $6,000.

In a letter dated July 24, 1992, the Dicks' counsel, Richard Senecal, asked Judge Moroney if there was going to be a trial on "damages," because he claimed to think that was the court's intent. The trial court answered on August 13, 1992, that the litigation was over and there would be no trial. **APP. C**, below.

Respondents nevertheless appealed for more money; Petitioners then appealed that the trial court decision dictated the return of the $6,000 to them, and that damages and punitive damages were due to them.

The Court of Appeals adopted the Respondents "damages" argument, and disagreed with almost everything presented by the McKinneys, contrary to the trial court's decision and whether or not the matter was subject to appellate review.

The Kansas Supreme Court denied review without checking the accuracy of the Court of Appeal's Opinion. They also completely ignored the trial court's decision and the Record, which tells a story quite different from the Court of Appeals' version.

VI. ARGUMENTS

FIRST ARGUMENT: THE KANSAS COURT OF APPEALS DENIED THE PETITIONERS DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT BY MISREPRESENTING THE TRIAL COURT'S DECISION OF SUMMARY JUDGMENT FOR THE PETITIONERS WHEN THE COURT STATED THAT PETITIONERS ACTUALLY LOST THE CASE BECAUSE THEIR REQUEST FOR RETURN OF $6,000 MONIES PAID FOR PURCHASE OF REAL ESTATE WAS DENIED.

The trial court explicitly awarded a very broad-based summary judgment for Petitioners.

There was really only one exception: the Petitioners were denied return of earnest monies/compensation paid, amounting to $6000.

The trial court alleged that the McKinneys had permitted the 1988 contract to fall through. It is unclear how they supposedly did this because the contract itself specifies its terms, which said the contract became null and void if: (1) a mortgage commitment, which is specifically described, was not received on or before May 1, 1988, (2) said commitment could not have a prepayment penalty, (3) clear title had to be furnished, (4) a written termite report had to be given the McKinneys, (5) the McKinneys had to sell their own house and generate at least $95,000 cash, etc. These matters were thoroughly discussed in the McKinneys' Memorandum in Support of [the Motion for] Partial Summary Judgment, Record, I, 247-324. 1/23/91

Also discussed therein was the Dicks' abstract of title, which was not marketable. Record, I, 247-248.

These issues were discussed at length in numerous subsequent motions for summary judgment by the McKinneys before May 17, 1991. The Dicks **never answered** even one of those motions, and as a matter of mandatory law conceded all the material facts. Judge Moroney recognized this point in his award of summary judgment to the McKinneys. Record, III, 845-860, at 856. The issues of the bad abstract of title and rescission were thoroughly covered. Record, III, 729-741. See the McKinneys' Appellees' Brief of Cross-Appeal, pp. 23-28.

The Court of Appeals' claim, that the McKinneys lost the case because of the $6,000 being given to the Dicks, is fraudulent. The trial court manufactured new "facts", and

misinterpreted the contracts to draw erroneous conclusions about the $6,000.

Virtually everything the trial court said about the $2,000 and the 1988 contract was factually wrong. Appellees' Brief of Cross Appeal, pp. 23-25. See also Mr. McKinney's Petition for Review [to the Kansas Supreme Court], pp. 3-8. The $2,000 belonged to the McKinneys.

In regard to the 1990 contract, the trial court was wrong about the abstract of title. It claimed that rescission on the basis of failure by the Dicks to furnish both the McKinneys a marketable, unencumbered abstract of title was "frivolous", to use Mr. Senecal's term in this application.

This view is unwarranted. On February 13, 1990, said abstract of title was definitely unmarketable. An admitted cloud was present; it was not a "possible", but a real problem, and the real estate taxes had not been

paid. The Dicks knew about these problems and tried to lure the McKinneys into buying property with a bad abstract and poor access. They assumed that since Mr. McKinney was very ill, he would not notice the abstract problems anyway. But the Dicks' abstracter raised such a big red flag a child could have seen it. Then Mr. Dick and his attorney admitted problems existed.

This course of events has been recounted over and over again in numerous places. To kill the vampire of attempted disinformation, the McKinneys filed a motion supposedly puting the matter to rest forever on these points: (1) the abstract of title was not good on February 13, 1990. (2) the Dicks claimed they demonstrated marketability on February 22, 1990, but that mistaken claim was based merely on their own lawyer's statement that it was okay. (3) The 1990 contract did not care what Mr. Swoyer, a lawyer censured by the

Kansas Supreme Court for conflict of interest and lying, said in a letter. It required that the Dicks furnish both the McKinneys with a marketable, unencumbered abstract of title, which is a physical document, so they could make requirements to pass marketability. (4) After February 13, 1990, neither the Dicks nor their lawyer furnished any abstract to either McKinney until late in 1990, long after closing was scheduled on March 1, 1990. A court order was required to do so then. See Mr. McKinney's detailed Defendants Response to Plaintiffs' Response to Defendant Henry Lewis McKinney's Motion for Summary Judgment, etc. Record, III, 892-917. 7/9/92. Cf. Appellees' Brief of Cross-Appeal, pp. 29-32.

The Court of Appeals could have easily read these filings which leave no room for speculations. The trial court was wrong on the marketability issue. The Dicks conceded the McKinneys' arguments on summary judgment

by not answering. The trial court conceded this issue as a matter of law by awarding summary judgment to the McKinneys. The Court of Appeals has simply quoted insubstantial conclusions that were wrong, and have been proven wrong.

However, the trial court itself allowed the 1990 contract to die anyway: **THE TRIAL COURT NEVER DENIED AT ANY TIME THE PETITIONERS' ARGUMENTS THAT RESCISSION WAS PROPER BECAUSE RESPONDENTS FRAUDULENTLY MISREPRESENTED THEIR ACCESS. THAT POINT IS PART OF THE COURT'S AWARD OF SUMMARY JUDGMENT.**

The issue of the 1990 contract is also well-covered in many motions by the McKinneys, which were conceded by failure to answer. There is no doubt that rescission for fraudulent misrepresentation canceled the 1990 contract.

Why did the trial court err about the $6,000 and rewrite the two contracts? The

answer is that the court wished to mollify the Dicks' greed, to appease them for having lost the case, in order to conclude this meritless litigation.

To cover up the fact that the rescission argument survived, the Court of Appeals claims the fraud argument was "rightfully disregarded by the trial court." This is false and ignores the broad-based award of summary judgment: "The Motion for Summary Judgment is granted, insomuch as it comports with the above mentioned rulings." Record, III, 923. Not one positive point is specifically listed in the statement above, and the McKinneys made numerous points, almost all of which were conceded.

Summary judgment extinguished **ALL THE DICKS' ARGUMENTS**. The Court of Appeals only pretends not to understand the effect of the trial courts' opinion and the McKinneys' motions for summary judgment.

If clearly biased courts are allowed to ignore due process and equal protection under the law, where do we go for justice? The McKinneys won, but lost? It should not be tolerated.

SECOND ARGUMENT: THE KANSAS COURT OF APPEALS HAS INTENTIONALLY MISREPRESENTED THE KANSAS CONSUMER PROTECTION ACT, K.S.A. 58, ARTICLE 30, AS IT APPLIES TO DICK V. MCKINNEY. SUCH MISREPRESENTATION VIOLATES PETITIONERS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

On February 1, 1991, the McKinneys filed an amended petition to their pleadings, which was heard by the Court, and approved, without Respondents' opposition, by the Court. The Dicks failed to respond as procedurally required under K.S.A. 60-208(d), and they thereby admitted all contentions as a matter of law. One of these contentions was that the

Dicks violated the Kansas Consumer Protection Act.

The Kansas Court of Appeals states, however, that Respondents were exempted from well-established procedures because they supposedly had denied the McKinneys' other earlier contentions in their original answers about one year earlier. This is an intellectually bankrupt contention. The Court's statements, which again originate from the Dicks, and never appeared before the appellate level, are false, meritless and frivolous and do not excuse the Dicks from following normal procedures.

Furthermore, evidence from the Record establishes the applicability of the Kansas Consumer Protection Act (KCPA, K.S.A. 58-624ff.) to Dick V. McKinney.

This unacceptable example of allowing the Dicks to violate procedures by failing to answer as required by law, as often happened

for the Dicks in this case, raises serious questions about the ethics of the Court of Appeals, about knowing the law and being unswayed by partisan interests.

The Court of Appeals, quoting the Consumer Protection Act itself, contends in App. A, p. 65-67, below, that the "Dicks cannot be characterized as 'suppliers' under the Consumer Protection Act because it "means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person, who in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." (Emphasis added by that Court) K.S.A. 1992 Supp. 50-624(i) "Therefore the Act cannot be applied to them."

By their own testimony in depositions, the Dicks have engaged in building barns and houses to sell as carpenters, general builders, contractors, and real estate persons for

many, many years: it has been their livelihood. (Depositions of Clifford L. and Patricia A. Dick, Record, VII, 1,3). Building and selling said buildings and real estate are clearly consumer oriented. They often have sold directly to the public as in the cases of Mr. and Mrs. Karl Ganz (Record, VII, Deposition of Clifford L. Dick, pp. 85-86, 89.) and Mr. and Mrs. Don Newell. (Newell v. Dick, case no. 91-C-53, pending)

Misrepresentation by the Court of Appeals of the Dicks' business and livelihood materially affects this case, and intentionally denies Petitioners due process and equal protection under the law. The Court by its statements proves it is unfamiliar with recent Kansas law on the KCPA such as Porras v. Bell, 18 Kan App. 2d 569 (1993), decided in its own appellate court, not to speak of the Record. The Court of Appeal's conclusion is clearly wrong and unsupported by the facts regarding

KCPA, and KCPA should be applied in full force to Dick v. McKinney because the Dicks have admitted the application long ago.

The trial court included KREBSA, Kansas Real Estate Brokers and Salesmen Act, in its award of summary judgment; its' application to this litigation is too obvious to deny intelligently. This Petitioner's point is that the Dicks are heavily into real estate as part of their construction business and under KREBSA, K.S.A. 58-3062(a) (31), and they should be forbidden from not informing their clients about problems with real estate they are selling. They have acquired millions of dollars of real estate and should have a duty to be honest about those dealings. Their dishonesty needs to be stopped. An incomplete inventory of their holdings in the Record contains 46 items. Record, II, 476-672. Exhibit 43.

THIRD ARGUMENT: THE KANSAS COURT OF APPEALS' RULING ON "DAMAGES" REWROTE THE 1988 AND 1990 CONTRACTS AND THE TRIAL COURT'S DECISION, AND ERRONEOUSLY SUBJECTED PETITIONERS TO "DAMAGES" AFTER THEY WERE AWARDED SUMMARY JUDGMENT. SUCH ACTION DENIED PETITIONERS' THEIR FOURTEENTH AMENDMENT RIGHTS OF EQUAL PROTECTION.

The argument that Petitioners won essentially unrestricted summary judgment, but Respondents still deserve damages because the trial court denied Petitioners the return of $6,000, was **NOT** intended by the trial court (See App C., below), and is not appropriate.

The 1990 contract does **NOT** discuss damages at all, as the Respondents and Court of Appeals agree. The 1990 contract did state, however, that "Anything not expressly set forth or referred to in the contract is null and void." Record, I, 58, par. 17.

Petitioners also pointed out in the McKinneys' Memorandum for Defendants' Motion to Dismiss (Record, II, 452-463) that Respondents had done nothing to mitigate their purported damages and therefore had no damages coming. Osborn v. Crego, 226 Kan. 212, 596 P.2d 1233 (1979). As usual Respondents did not answer the Petitioners' Memorandum and therefore admitted all statements of fact, making damages unavailable to Respondents. See Appellees' Brief of Cross Appeal, p.40. The Court of Appeals ignored this evidence and denied Petitioners due process and equal protection.

EQUALLY IMPORTANT IS THAT THE TRIAL COURT LET STAND PETITIONERS' ARGUMENT THAT FRAUDULENT MISREPRESENTATION OF RESPONDENTS' ACCESS ROAD JUSTIFIED RESCISSION; THE TRIAL COURT DID NOT REJECT IT.

By failing to reject the fraud argument, the trial court allowed the 1990 contract to

die. The legal consequence was that the $4,000 should have been returned to Petitioners anyway.

The Court of Appeals has tried to argue the case again, although the award of summary judgment was not appealed and was not subject to appellate review.

The Court of Appeals has rewritten the 1988 and 1990 contracts to give the Dicks more favorable new terms, to misrepresent and omit the arguments, and to lie unethically about facts and law. Using the conclusion of Respondents', that the Petitioners won summary judgment but they lost the case as a springboard, the Court of Appeals also adopted Respondents' arguments about "damages", which had already been rejected by the trial court.

All Petitioners' arguments have been ignored, thus denying them due process and equal protection under the law. There was never any attempt by the Court of Appeals to

recognize the significance of Petitioners' award of summary judgment, which is treated as irrelevant, an insignificant impediment to giving Respondents' "damages".

Judge Moroney awarded summary judgment to Petitioners but, as a gesture to try and end the litigation, gave the $6,000 to Respondents, which summary judgment required be returned to Petitioners. The Court of Appeals has tried to reargue and undo the summary judgment award when the award was not subject to review. A careful textual analysis of the Court of Appeals' Opinion reveals that most of said opinion focuses on the summary judgment, which was not subject to review, and on attempts to rewrite the 1988 and 1990 contracts with new terms more favorable to the Dicks, The goal was to undermine the trial court's opinion in general.

The Court of Appeals' Opinion opposes the trial court's Memorandum Decision. Because

the Kansas Supreme Court did not review the Court of Appeals' opinion closely, or the trial court's opinion, or the Record, it has been necessary to seek relief for constitutional violations with the United States Supreme Court. Without said relief, the Respondents will seek unlimited damages from their local court, after losing the case, and constitutional rights will continue to be ignored in Kansas.

FOURTH ARGUMENT: THE COURT OF APPEALS AND THE TRIAL COURT DENIED PETITIONERS' EQUAL RIGHTS OF PROTECTION BY IGNORING MR. MCKINNEY'S MENTAL CONDITION WHEN THE 1990 CONTRACT WAS SIGNED.

Petitioner Henry Lewis McKinney experienced serious kidney failure beginning in the fall of 1987 and stopped teaching at the University of Kansas after the spring term of 1988 except for a few advanced students. His health continued to fail, and by the end of

1989, Mr. McKinney was critically ill and under extreme duress.

Extensive medical testimony has been introduced in the Record that Mr. McKinney was mentally unable because of complications from his severe kidney failure to conclude any contracts whatsoever. Record, III, 720 (Exhibit B) All this fundamental evidence has been swept under the rug, but it was a major component of the McKinneys' amended petition of February 1, 1991. Record, II, 330-335. It should not be overlooked, because the Dicks failed to answer and have admitted the major role Mr. McKinney's health has played in this litigation. The issue was preserved in Mrs. McKinney's Petition for Review, pp. 2-3.

VII. REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The United States Supreme Court should issue a writ of certiorari to Petitioners to

prevent a gross miscarriage of justice and numerous violations of the Fourteenth Amendment to the Constitution.

The Kansas Court of Appeals has abandoned law to issue an overtly biased and prejudicial presentation in favor of the Respondents which will not withstand serious appellate review. The court's decision even argues that while it is true that the McKinneys were awarded an extremely broad-based summary judgment, the Dicks actually won because the trial court denied the McKinneys the return of their $6,000!

Respondents have claimed "damages" and a prejudiced Court of Appeals wishes to allow the Respondents to argue for as many "damages" as they can establish before a local court. <u>They</u> lose the case and <u>they</u> seek "damages"! How could Petitioners win so overwhelmingly in the trial court and yet really lose, and then

even more paradoxically be subject to unlimited "damages"?

The Court of Appeals' Opinion opposes the law, the facts, the contracts between the parties, the trial court's decision and the Fourteenth Amendment to the Constitution. The McKinneys should be granted a writ of certiorari to prevent a miscarriage of justice.

CONCLUSION

The trial court issued broad ranged summary judgment for the McKinneys, but rejected their request for the return of their $6,000. In light of the Court's summary judgment award, and the facts, the law, and the contracts, the $6,000 should have gone to the McKinneys because that is the intent of the 1988 and 1990 contracts.

The trial Court thought that the McKinneys should win the case, and the Dicks should receive a gratuity of $6,000 in an attempt to

end the litigation. To accomplish this the trial court had to re-write parts of the contracts of 1988 and 1990.

The McKinneys' Memorandum in Support of Partial Summary Judgment, Record, I, 247-324, 1/23/91, lays out the material facts clearly on the 1988 contract and discussed the abstract issue of the 1990 contract.

The 1988 contract itself, by its own terms, required the termination of said agreement, all of which the Respondents acquiesced in by failing to answer under Supreme Court Rule 141(b), a point which the trial court has confirmed in its decision. See Petitioners' Motion for Summary Judgment. . .Record, III, 859. Said motion settled both the 1988 and 1990 contracts.

Further support for the award of summary judgment is seen in the trial court's conspicuous failure to exclude Petitioners' argument that rescission was proper for Respondents'

fraudulent misrepresentation of their access road. Therefore, the 1990 contract was properly canceled.

Even if the trial court erroneously thought the 1990 contract survived the abstract problem (see Defendants' Response to Plaintiffs; Response to Defendant Henry Lewis McKinney's . . .Record, III, 892-917, which should have settled that issue), **RESCISSION FOR FRAUDULENT MISREPRESENTATION SURVIVED**, and the 1990 contract died a death just as final as if the trial court accepted both arguments.

The Respondents appealed on the sole point that they have the $6,000, so they deserved more. **THEY DID NOT APPEAL THE TRIAL COURT'S AWARD OF SUMMARY JUDGMENT NOR DID PETITIONERS.**

The McKinneys have stressed that the trial court's decision confirmed the mandatory nature of Supreme Court Rule 141(b), and also KCPA, which was actually admitted by Respon-

dents' failure to answer in February 1991. All these matters extinguished Respondents' arguments, including the frivolous request for "damages", their sole goal from the beginning.

These matters discussed immediately above were the focus of appeal. The Court of Appeals in violation of Kansas law attempted to reconfigure the trial court's decision of summary judgment which was not on appeal. Gordon v. Gordon, 218 Kan 686, 545 P.2d 328 (1976); it has attempted to rewrite the decision and the contracts to benefit the Dicks. Bailey v. Talbert, 179 Kan 169, 294 P.2d 220 (1956); it misrepresented the facts and the law; it omitted certain crucial facts; and accepted lies in lieu of established facts; and finally the Court of Appeals presented a superfluous, lengthy discussion of "damages" which were, by the 1990 contract, unavailable to Respondents. See App. D, below.

Why was it necessary to lie about what the trial court said? Why was it necessary to rewrite the 1988 and 1990 contracts? Why was it necessary to present lies and deceptions about the facts of the case? Why was it necessary to discuss issues decided by the trial court and no longer subject to discussion and not even on appeal?

Without question the Court of Appeals was attempting to justify giving the McKinneys' money to the Dicks. A full textual analysis reveals that decision was a hatchet job on the McKinneys' award of summary judgment -- that seems to be what the Court of Appeals really tried to reverse, not just the point about "damages". How could the Court of Appeals reverse what was not on appeal and not available for appellate review?

The Kansas Judicial System and Mangiaracina v. Gutierrez, 11 Kan. App. 2d 66, 730 P. 2d 1109 (1988), tell us that the scales of

justice weigh equal, but they have not in Dick v. McKinney. What we have really seen is an unconstitutional attack on the pro se litigant as much as anything else.

DATED this 25th day of January, 1994.

Respectfully submitted,

Henry Lewis McKinney

Henry Lewis McKinney
Submitting Pro Se
1230 W. 28th Court
Lawrence, Kansas 66046
(913) 842-7425

APPENDIX A
NOT DESIGNATED FOR PUBLICATION

No. 68,581

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CLIFFORD L. DICK and PATRICIA A. DICK
Appellants,

v.

HENRY LEWIS McKINNEY and LILLIE MARIE McKINNEY
Appellees.

MEMORANDUM OPINION

Appeal from Jefferson District Court; MICHAEL G. MORONEY, judge. Opinion filed July 30, 1993. Affirmed in part, reversed in part, and remanded with directions.

Richard P. Senecal, of Duncan, Senecal and Bednar, Chartered, of Atchison, for appellants

Jonathan B. Phelps, of Phelps Chartered,

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of Topeka, for appellee Lillie Marie McKinney.

Henry Lewis McKinney, appellee pro se.

Before GERNON, P.J., BRAZIL, J., and THEODORE B. ICE, District Judge, assigned.

GERNON, J.: Clifford and Patricia Dick appeal a trial court's ruling which limited their recovery following rescission of a real estate contract they had with Henry and Lillie McKinney. The trial court limited the Dicks' recovery to the earnest money paid. The McKinneys cross-appeal, alleging several other errors by the trial court.

The Dicks owned real property in Jefferson County. The McKinneys and the Dicks themselves wrote a contract in April of 1988 for the sale of the Jefferson County real estate to the McKinneys. The 1988 contract

had several contingencies and a handwritten provision. The McKinneys paid the Dicks $2,000 as earnest money. The contingencies were not met, and the sale was never completed.

In January of 1990, the parties wrote a new contract. The new agreement provided that the McKinneys would trade their Lawrence home for the Dicks' home, with the Dicks financing a loan to the McKinneys for the difference. The McKinneys paid the Dicks $4,000 on the day the contract was signed. The $4,000 payment made by the McKinneys is not labeled as earnest money in the 1990 contract, as was the $2,000 in the 1988 contract. We note that the two contracts were written by the parties without the benefit of legal counsel.

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After the abstract of the Dicks' property was delivered to Henry McKinney, he discovered a possible cloud on the title. Apparently the abstract showed that a predecessor in title held a mortgage on the property. The mortgage holder had died, and it was necessary to obtain affidavits of heirship and other proof that the mortgage was paid. All of this was done, and, well before the closing date, Henry McKinney was advised that the Dicks had "good and merchantable title."

The McKinneys, through an attorney, then advised an attorney for the Dicks that they were rescinding the January 1990 contract. The rescission was based on the following: (1) The Dicks fraudulently represented the all-weather accessibility of the property; (2) the January 1990 contract suggested that

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additional agreements needed to be reached between the parties and these had not yet been reduced to writing; (3) the Dicks failed to return the $2,000 the McKinneys paid under the 1988 contract; and (4) existence of clear title had not yet been provided to the satisfaction of the McKinneys.

On March 6, 1990, the Dicks filed suit against the McKinneys, asking the court to order specific performance under the terms of the January 1990 contract or, if the contract could not be enforced, that they be awarded damages for having their property off the market for a considerable time, for the expense of vacating the property to give the McKinneys possession, and for the loss of interest which they had suffered and would continue to suffer. The McKinneys filed a

counterclaim, demanding return of $6,000 (the $2,000 and $4,000) and asking that the 1990 contract be set aside because of fraudulent misrepresentations by the Dicks.

In January of 1991, the Dicks dropped their request for specific performance and elected to proceed on a breach of contract theory. They also asked the court to conclude that the McKinneys had no interest in the property so that it could be sold. The McKinneys raised no objection to the subsequent sale of the property.

Both sides filed numerous motions for summary judgment. On May 17, 1991, the trial court denied both parties summary judgment, finding that material facts remained unresolved.

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In May of 1992, Lillie McKinney, now represented by counsel, filed a motion to dismiss the Dicks' petition and a motion for summary judgment. Henry McKinney, still representing himself, filed a motion to adopt the above motions. The Dicks responded to these motions, but did not file their own summary judgment motion. The McKinneys' motion came on for hearing on June 16, 1992, but no record of these proceedings is provided on appeal.

The trial court granted the McKinneys' motion for summary judgment, but essentially found in favor of the Dicks, allowing them to keep the $6,000. Stating that "[a] party to a contract may properly rescind said contract if the other party materially breaches the contract," the court found that the McKinneys' rescission of the 1990 contract was "invalid

and frivolous," as it was based upon "an imagined lack of marketability." The court did not address the McKinneys' claim of fraudulent misrepresentation regarding access to the property. In addition, the court found the 1988 contract "fell through" as a result of the McKinneys' actions, and, thus, they forfeited the $2,000 in earnest money. Essentially, the trial court tried to put the parties in the same position they were in before entering the 1988 contract.

Both sides filed motions to reconsider, but these were denied by the trial court. The Dicks timely filed notice of appeal, and the McKinneys timely filed notice of cross-appeal. Additional facts will be presented as necessary to discuss the issues on appeal.

The trial court held that the Dicks "shall be entitled to retain the $6,000--Six

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Thousand Dollars; all fully intended from the inception of the bargaining process, to have been earnest money, and the anticipatory mitigation of damages."

Before reaching the issue of additional damages, two preliminary issues must be addressed.

Early on in the litigation, the Dicks elected to enforce only the 1990 contract. However, the trial court specifically ruled that the Dicks' retention of the $2,000 earnest money under the 1988 contract was proper. The McKinneys argue that such a finding was error where the Dicks had elected to enforce only the 1990 contract. The record clearly reflects that it is the McKinneys who have repeatedly raised this issue, demanding return of the $2,000.

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Our reading of the record leads us to conclude that there is substantial competent evidence to support the trial court's finding that the McKinneys permitted the 1988 contract to fall through, therefore forfeiting the original $2,000 in earnest money. The 1988 contract required the McKinneys "to obtain a commitment for said loan on or before May 1, 1988." Capitol Federal Savings agreed to make the loan to the McKinneys and Henry McKinney assured Clifford Dick, prior to May 1, 1988, that such a commitment had been obtained. The terms of the loan that were written into the 1990 contract were those terms that Henry McKinney had discussed with the bank. Henry McKinney later refused to accept the loan because Capitol Federal insisted on retaining a prepayment penalty in the mortgage. Henry McKinney did not attempt to get a loan from any other area lending source because their

terms were not as favorable as those at Capitol Federal. The McKinneys' argument that they did not receive a commitment from Capitol Federal prior to May 1, 1988, is simply not made in good faith. Under the terms of the contract, when the McKinneys then failed to sell their Lawrence home prior to November 1, 1988, the $2,000 was forfeited to the Dicks.

The other preliminary issue is whether the McKinneys breached the 1990 contract by improperly rescinding the agreement. Again, substantial competent evidence supports this finding by the trial court. Any alleged defect in the merchantability of the title was cured prior to March 1, 1990, and Henry McKinney's refusal to accept the title opinion as true was unreasonable under these circumstances. The McKinneys' additional arguments that the contract required actual physical delivery

of the abstract and that Lillie McKinney had never seen the abstract, contrary to the contract, do not merit consideration and border on the frivolous.

Also, the McKinneys' claim of fraudulent misrepresentation as a basis for rejecting the contract is not supported by the record and was rightfully disregarded by the trial court. Clifford Dick told the McKinneys that the driveway might require blading after snowstorms and that a yearly application of additional gravel would provide traction in the winter. The record is void of any evidence of intent to deceive on the part of the Dicks. The McKinneys have lived within a few miles of the property for many years, had personally viewed the driveway numerous times, and were fully aware that inclement weather can some-

times make even the flattest and fittest of roads impassable.

The 1990 contract does not contain any provision relating to breach by the buyers and does not address the issue of damages. The only such provision relates to default by the sellers: "In the event Sellers are unable or fail to furnish title or possession as agreed in this contract, then, at the option of Buyers, this contract shall be terminated and all monies and considerations paid shall be refunded to Buyers."

After determining that the rescission of the 1990 contract by the McKinneys was improper, the court allowed the Dicks to retain the $4,000 paid by the McKinneys on the date the contract was signed.

The Dicks argue on appeal that, because the McKinneys breached the 1990 contract, they

should not be limited to the $4,000 as damages resulting from the breach. The contract itself is silent as to damages in the event of breach by the buyers. The contract does address the possibility of breach by the buyers should the buyers fail to make the necessary payments on the loan from the sellers, but all of this assumes that the transaction was consummated and that the transfer actually took place, which is not a fact here.

The question thus becomes whether the trial court erred in interpreting the $4,000 payment by the McKinneys as anticipatory mitigated damages or liquidated damages. "'[T]he propriety of liquidated damages is a question of law for the court.'" Kvassay v. Murray, 15 Kan. App. 2d 426, 429, 808 P. 2d 896, rev. denied 248 Kan. 996 (1991). This court's review of conclusions of law is unlim-

ited. Gillespie v. Seymour, 250 Kan. 123, 823 P. 2d 782 (1991).

"'A cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if the intention is consistent with legal principles.'" Hollenbeck v. Household Bank, 250 Kan. 747, 751, 829 P.2d 903 (1992).

As advance payment pursuant to a contractual agreement may serve as liquidated damages if the amount of damages for breach of the contract has been agreed upon in advance, foreclosing any need to prove the actual damages resulting from the breach. See White Lakes Shopping Center, Inc. v. Jefferson Standard Life Ins. Co., 208 Kan. 121, 125, 490 P.2d 609 (1971). However, if the advance payment is determined by the court to be a penalty, a punishment for default, without

regard to actual damages resulting on a breach of the contract, its forfeiture is unenforceable. "In such cases the nondefaulting party is left to a recovery of such actual damages as he can prove." 208 Kan. at 125. See Beck v. Megli, 153 Kan. 721, 726, 114 P.2d 305 (1941); U.S.D. No. 315 v. DeWerff, 6 Kan. App. 2d 77, 78-79, 626 P.2d 1206 (1981).

In determining whether an advance payment is intended as a penalty or as liquidated damages,

> "[t]he instrument must be considered as a whole, and the situation of the parties, the nature of the subject matter and the circumstances surrounding its execution taken into account. There are two considerations which are given special weight in support of a holding that a contractual provision is for liquidated damages rather than a penalty--the first is that the amount stipulated is conscionable, that it is reasonable in view of the value of the subject matter of the contract and of the probable or pre-

> sumptive loss in case of breach; and the second is that the nature of the transaction is such that the amount of actual damage resulting from default would not be easily and readily determinable." Beck, 153 Kan. at 726.

Generally, an advance payment will be considered a penalty where the parties made no attempt to calculate the amount of actual damages that might be sustained in case of breach. "An indication of this lack of calculation is deemed present when the amount of stipulated damages is the same for a total or partial breach, or for breach of minor or major contract provisions." DeWerff, 6 Kan. App. 2d at 80.

We conclude that the $4,000 paid by the McKinneys to the Dicks on the date the 1990 contract was signed was intended solely to secure the McKinneys' performance under the agreement. There is no evidence that the

$4,000 figure was the result of any attempt to calculate the amount of actual damages which could result from a breach of the contract. Moreover, there is nothing in the record to suggest that $4,000 was a reasonable sum or that the actual damages upon the breach by the McKinneys would be difficult to ascertain. Our conclusion is bolstered by examining the 1990 contract as a whole, the situation of the parties, the prior relationship of the parties, the nature of the subject matter, the circumstances surrounding the execution of the contract, and the fact that none of the parties is an attorney. Our reading of the case law suggests that the trial court incorrectly determined that the $4,000 was intended as liquidated damages rather than as a penalty designed to assure the McKinneys' performance under the 1990 contract. The Dicks argue that the case must be remanded to the trial court

so they may present evidence as to the amount of actual damages. We agree and direct that the matter be remanded so the Dicks may be given a full opportunity to present evidence as to the amount of actual damages.

Failure to Grant
McKinney's Summary Judgment Motion

The McKinneys filed a motion for partial summary judgment, asking the trial court to declare the 1988 contract null and void and to order the Dicks to return the $2,000 earnest money. The Dicks had filed a previous motion for partial summary judgment. Both sides then filed responses, motions, and other writings with the court.

The trial judge found, on May 17, 1991, that there remained "material contentions of fact asserted by both parties and material facts controverted by each." The court then

wrote: "The Court, as a matter of law, finds and orders that in the case at bar summary judgment does not lie and that all such motions, both Plaintiffs' and Defendants', should be and are denied." Immediately after this ruling, the McKinneys filed another motion, entitled "Motion for Directed Summary Judgment for Defendants as a Matter of Law." The McKinneys argued in that motion that they were entitled to summary judgment as a matter of law because the Dicks failed to comply with Supreme Court Rule 141 (1992 Kan. Ct. R. Annot. 124). The McKinneys argued that the Dicks failed to file Direct responses to each of the McKinneys' motions and responsive pleadings and therefore, these statements were deemed true. The trial court denied their motion ex parte. The McKinneys renew this argument in their cross-appeal.

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Supreme Court Rule 141 contemplates that, where one party files a motion for summary judgment, should the opposing party fail to file a response listing the controverted facts and conflicting evidence, the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the memorandum or brief of the moving party. Neither party in the present case complied with Rule 141(a), which requires a moving party to list the uncontroverted facts in an organized fashion. Thus, it is not surprising that the Dicks' responses do not technically comply with Rule 141(b). Both sides improperly listed controverted opinions rather than uncontroverted facts in support of their motions. Requiring the Dicks to respond to each of the McKinneys' statements would be unduly burdensome, in our view, and not within

the spirit of Rule 141. The pleadings in the present case fully apprise the trial court of both sides' positions regarding controverted and uncontroverted facts in a voluminous fashion.

Our review of the various pleadings before the trial court demonstrates that controversy existed regarding the material facts in the case. The trial court, at that stage, properly denied summary judgment.

Failure to Deliver Abstract

This court has referred to this issue earlier in the opinion. However, simply to acknowledge its existence, we will state that we agree with the trial court that the McKinneys' rescission of the 1990 contract was "invalid and frivolous" and based upon "imagined lack of marketability." The McKinneys

contend that the 1990 contract required the Dicks to physically deliver an abstract demonstrating marketable title to both Henry and Lillie McKinney prior to March 1, 1990. They argue that an unencumbered, marketable abstract of title was never delivered to Henry McKinney and that the Dicks, in an attempt to exclude Lillie McKinney from the purchasing process, never furnished her with any abstract of title whatsoever.

Substantial competent evidence supports the trial court's conclusion that the McKinneys' rescission of the 1990 contract, based upon the above recited reasons, was improper. Patricia Dick delivered a copy of the abstract to the McKinneys' home. Henry McKinney identified a possible problem regarding marketability, and the problem was corrected well

APPENDIX A

within the time frames required under the agreement of the parties.

Kansas Consumer Protection Act Claim

In amending their original answer and counterclaim against the Dicks, the McKinneys added a claim that the Dicks had knowingly violated the Kansas Consumer Protection Act, K.S.A. 50-623 et seq. The McKinneys maintained that the Dicks engaged in deceptive practices by failing to truthfully inform them of the problem of access onto the property. This issue was mentioned previously as the driveway issue the McKinneys used as a basis to rescind the contract.

The McKinneys claim that the Dicks failed to respond to this amended pleading and have, therefore, admitted the violation. They point

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to K.S.A. 1992 Supp. 60-208(d), which provides: "Averments in a pleading to which a responsive pleading is required or permitted, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

The Dicks had previously filed an answer to the McKinneys' original counterclaim and expressly stated therein that any and all allegations not admitted were denied. Moreover, the facts used to support the McKinneys' claim under the Kansas Consumer Protection Act were the same facts alleged in their original counterclaim, which were denied by the Dicks. We find no merit to this argument.

It is elementary that the Dicks cannot be characterized as "suppliers" under the Kansas Consumer Protect Act. "'Supplier' means a

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manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." (Emphasis added.) K.S.A. 1992 Supp. 50-624(i). Therefore, the Act cannot be applied to them.

The McKinneys' Damages

The McKinneys argue that the facts of this case require that they be awarded damages for several reasons: (1) The Dicks illegally converted the $6,000 paid under the two contracts; (2) the Dicks breached the 1990 contract by ignoring the sole remedy available to them; (3) the Dicks violated the Kansas Real Estate Brokers' and Salespersons' Act, K.S.A. 58-3034 et seq.; and (4) the Dicks

violated the Kansas Consumer Protection Act.

Although most of the issues raised by the Dicks here have been discussed previously, the issue concerning the Kansas Real Estate Brokers' and Salespersons' Act deserves comment.

The McKinneys argued below that, based upon the Dicks' "extensive real estate holdings and experience," the Dicks "level of responsibility should therefore be controlled by the Kansas Real Estate Brokers and Salesman Act." Other than that conclusory statement, the McKinneys provide no legal basis to bring the Dicks within the scope of the Act. They provide no reference to the specific statute or subsection thereof which the Dicks allegedly violated.

We need not repeat the arguments concerning the other reasons given to support a claim

for damages by the McKinneys, as we have dealt with them above. The trial court did not err in denying the McKinneys recovery for damages.

Punitive Damages

Finally, the McKinneys argue that they were entitled to punitive damages because the Dicks wrongly converted the $6,000 and made fraudulent misrepresentations to them about the access to the property.

"In Kansas, punitive damages are awarded to punish the wrongdoer for his malicious, vindictive, or willful and wanton invasion of another's rights, with the ultimate purpose being to restrain and deter others from the commission of similar wrongs.." Folks v. Kansas Power & Light Co., 243 Kan. 57, 72, 755 P.2d 1319 (1988).

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We find nothing here to justify punitive damages against the Dicks and, therefore, agree with the trial court.

Affirmed in part, reversed in part, and remanded with directions for the trial court to allow the Dicks to present evidence as to the actual damages they experienced as a result of the McKinneys' breach.

APPENDIX B

SUPREME COURT ORDER DISTRICT CASE NO. 90C10

IN THE SUPREME COURT

OF THE STATE OF KANSAS

HENRY LEWIS MCKINNEY
1230 W 28TH COURT
LAWRENCE KS 66046

PRO SE

CLIFFORD L. DICK AND PATRICIA A. DICK, APPELLANTS,
V
HENRY LEWIS MCKINNEY AND
LILLIE MARIE MCKINNEY

NO. 92-68581-AS

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLEE, HENRY MCKINNEY. CONSIDERED BY THE COURT AND DENIED.

DATE: 09/28/93.

CAROL G. GREEN
CLERK

APPENDIX C

DISTRICT COURT OF KANSAS
CHAMBERS OF COURTHOUSE
MICHAEL G. MORONEY KANSAS CITY, KANSAS
WYANDOTTE COUNTY

August 13, 1992

Richard P. Senecal
Attorney at Law
817 Santa Fe,
P.O. box 349
Atchison, Kansas 66002
-0349

Jonathan B. Phelps
Attorney at Law
1414 S.W. Topeka Boulevard
Topeka, Kansas 66612

Henry Lewis McKinney
1230 W. 28th Court
Lawrence, Kansas 66046

RE: **CLIFFORD L. DICK AND PATRICIA A. DICK vs. HENRY LEWIS MCKINNEY AND LILLIE MARIE MCKINNEY**
CASE NO. 90-C-10

To All Parties:

I consider the lawsuit at an end. There will be no trial.

Very sincerely,
/S/
Michael G. Moroney
Judge of the District Court
Division Thirteen
29th Judicial District

MGM/ara

APPENDIX D

CHARACTERISTIC ERRORS BY THE COURT OF APPEALS' OPINION OF 7/30/93

1. "The record is void of any evidence of intent to deceive on the part of the Dicks." App. A, p. 54. This is a characteristic blatant lie. The Dicks lied continuously from the filing of the initial petition to the Court of Appeals' oral presentation. See Record, II, 394-528. ("Who's Telling the Truth?")

2. The entire discussion of the 1988 contract is mostly false. App. A, pp. 51-52. See Mr. McKinney, Petition for Review, pp. 3-8, which discusses the falsehoods one by one.

3. The Court of Appeals admits that the Dicks were technically guilty of ignoring Kansas Supreme Court Rule 141(b) law but they say it was okay not to answer because complying would be too "burdensome"! Or, that court claims that the McKinneys did not follow the

rule either! (This unsupported, newly brought up contention is false also.) Therefore, it was okay for the Dicks not to answer? The Dicks filed the suit; how can it be too burdensome for them to prove their false claims?

None of this discussion is relevant, fair or impartial. The 1988 contract issue was conceded by the trial court in awarding summary judgment. The Court of Appeals intentionally misunderstands Rule 141 (b) and its consequences.

4. K.S.A. 60-208(d). The Court of Appeals claims that the Dicks did not need to answer the McKinneys' amended petition because of actions supposedly occurring the previous year. Perhaps that explains why they did not need to answer discovery or follow standard procedures on a host of things, like signing alleged motions for summary judgment. The Court of Appeals' ridiculous argument is

biased, prejudiced and without merit. App. A, pp. 65-66.

5. ". . . .Henry McKinney assured Clifford L. Dick, prior to May 1, 1988, that such a [mortgage] commitment had been obtained." App. A, p 51. It was shown in deposition that Mr. Dick perjured himself when he made this claim, which could not have happened. See Mr. McKinney, Petition for Review [to the Kansas Supreme Court], p. 6. This is some of the false "evidence" the Court of Appeals has adopted.

6. The Court of Appeals states that the abstract problem was taken care of well before March 1, 1990. There is no citation to law to support this false assumption. The Dicks' attorney conducted probate by telephone. He was not a probate judge and neither he nor his clients then furnished good abstract of title to the McKinneys, nor did they furnish any

proof of good title. The Court of Appeals seems to be unfamiliar with probate proceedings or the Record. App. A, p. 45.

7. Mr. Dick gave no warnings about the access before the lawsuit was filed and there is no proof in the Record that he did. His repeated statement was "there's never a problem with the access." This was heard by many witnesses. This entire subject has been gone over and over and it was not on appeal.

8. The entire discussion of "damages" is wrong, self-contradictory, and without merit. By not answering motions for summary judgment, the Dicks conceded the damages issue in February 1991, and they had no ground to stand on. See Mrs. McKinney, "damages" in Petition for Review, pp. 11-13, App. A, pp. 54ff.

9. The KCPA matter reflects the Court of Appeals' approach to this case: lie when cornered. Anyone can see that KCPA applies

to Dick v. McKinney. The Record proves it; KCPA proves it as well. App. A, pp. 65-66.

10. The McKinneys' amended petition of February 1, 1991 (Record, II, 330-335) contained new contentions to add to their original pleadings. The Court of Appeals provides no citations to prove otherwise. The reader of this petition should ask why the McKinneys would wish to waste time repeating their original petition. The KCPA was a new point as was KREBSA. App. A, p. 66.

11. ". . . without the benefit of legal counsel". This is false that the litigants were without legal counsel. The Dicks saw James F. Swoyer, Jr. on a regular basis; the McKinneys consulted the family attorneys on a regular basis also as established in depositions. App. A, p. 44.

APPENDIX D

12. "Essentially, the trial court tried to put the parties in the same position they were in before entering the 1988 contract." App. A, p. 49. The McKinneys are $6,000 poorer plus huge expenses for legal bills because of the Dicks' actions. "Same position"? Ridiculous! Furthermore, the damage to Mr. McKinney's health has been enormous.